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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re LOWLIN SAEPHARN, on Habeas Corpus.	C060917 (Super. Ct. No. 08F09235)

On the morning of January 31, 1985, 19-year-old Lowlin Saepharn stabbed his 15-year-old, pregnant girlfriend in the chest, causing her death and that of her unborn child. Saepharn pleaded guilty to two counts of second degree murder with a weapon use enhancement and was sentenced to an indeterminate term in state prison of 16 years to life. On April 30, 2008, the Board of Parole Hearings (Board) conducted a sixth parole consideration hearing and found Saepharn unsuitable for parole.

Saepharn filed a petition for writ of habeas corpus in the superior court, which was denied on December 8, 2008. On January 26, 2009, he filed a petition for writ of habeas corpus in this court. We issued an order to show cause to John Marshall, Warden of California Men's Colony--East (Warden) in

order to review the Board's decision. The Warden filed a return to our order to show cause, and Saepharn filed a traverse.

On July 21, 2009, the Board disapproved its April 30, 2008, decision and ordered a rehearing of Saepharn's sixth parole suitability hearing. Shortly thereafter, the Warden moved to dismiss the petition as moot. Saepharn filed opposition.

We conclude that, because the best Saepharn could hope for on his petition would be a rehearing by the Board, and the Board has already ordered a rehearing, the matter is moot. We therefore dismiss the petition.

FACTS AND PROCEEDINGS

The following description of the commitment offense is taken from the transcript of the April 30, 2008, parole suitability hearing.

At the time of the murders, Saepharn had been dating the 15-year-old victim for about a year and she was 27 to 30 weeks pregnant with their child. The victim already had one child, a 14-month-old daughter. Saepharn often stayed at the home of the victim's family, sleeping with the victim in her bedroom. They were planning to be married.

On the morning of January 31, 1985, Saepharn stabbed the victim in the chest during an argument and fled the home. She died shortly thereafter.

Later that day, Saepharn called a family friend and said he was going to the river to commit suicide. Saepharn was later apprehended by police officers walking along a levee.

Saepharn admitted the offense and that it had occurred during an argument over an accusation that he pulled hair from the scalp of the victim's daughter. Saepharn told the police the victim had informed him that morning he would either have to admit he pulled the child's hair or seek counseling through "the elders." Saepharn said he feared the victim might hire someone to kill him and had hidden a knife in the bedroom.

Saepharn also told the police the victim had received a phone call that morning but refused to tell him who had called. At that point, he grabbed a flashlight and hit her on the head. The victim fell to the floor crying, and Saepharn grabbed the knife and stabbed her.

At the probation hearing, Saepharn gave a somewhat different version of the incident. He claimed he had not hidden the knife in the bedroom to use it on the victim but to cut up fruit. Saepharn asserted that, on the morning of the murders, the victim had been yelling and cussing at him. When she got the phone call and refused to tell him who it was, he did not know how to handle it and "went blank." He grabbed the flashlight and hit her on the head. According to Saepharn, the victim then started screaming and coming at him. He choked her until she passed out and then grabbed the knife and stabbed her.

Saepharn acknowledged responsibility for the crime and expressed his deep regret for what he had done. Other evidence was presented regarding Saepharn's participation in anger management and other training classes while in prison, his many commendations for good behavior and participation in programs to

help others, his favorable psychological evaluations, his lack of any other criminal record, and his relative lack of prison infractions.

Near the end of the hearing, the Board heard from a representative of the district attorney's office, who argued the crime itself warranted life in prison. The Board also heard from the victim's daughter, who first read from a statement prepared by her aunt, the victim's sister. The aunt indicated Saepharn had recently contacted her family and she was afraid Saepharn would come after her family some day if he was released. The victim's daughter stated her grandmother, the victim's mother, had been contacted by Saepharn's family and had been told Saepharn asked them to call and request that they let Saepharn alone and "set him free."

The Board panel found Saepharn unsuitable for parole for a number of reasons. One panel member cited the commitment offense, which she called "extremely cruel, extremely cold-blooded and extremely callous." She also characterized the motive for the crime as "inexplicable." The other panel member opined that Saepharn came across too smooth, with no emotions, like he was reading from a script. The member expressed the view of the panel that they did not believe Saepharn was "getting the message," because his explanation for why he committed the offense did not make any sense. The member saw very little remorse, only an inmate "reading a script" and "going through the motions." Finally, the panel member indicated that if Saepharn is directing family members to

contact the victim's family, then "shame on you" and "you better cut it out."

Saepharn filed a petition for writ of mandate in the superior court. That court denied the petition, concluding the evidence regarding contacts between Saepharn's family and the victim's family support the Board's finding of unsuitability.

DISCUSSION

I

Introduction

Penal Code section 3041 addresses how the Board makes parole decisions for indeterminate life inmates. (Undesignated section references that follow are to the Penal Code.) Subdivision (a) requires a Board panel to set a parole release date "in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public." (§ 3041, subd. (a).) However, under subdivision (b), the panel need not set a parole release date if it determines the inmate is presently unsuitable for parole because "the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual . . . ." (§ 3041, subd. (b).)

Under applicable regulations, "a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to

society if released from prison." (Cal. Code Regs., tit. 15, § 2402, subd. (a).) The regulations list various factors tending to show unsuitability for release on parole and other factors tending to show suitability. (*In re Burdan* (2008) 169 Cal.App.4th 18, 28.) The importance of these factors is for the Board panel to decide (Cal. Code Regs., tit. 15, § 2402, subds. (c), (d)), and judicial review of such decision is strictly limited. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.) "'[T]he court may inquire only whether *some evidence* in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation.' ([*In re Rosenkrantz*, *supra*, 29 Cal.4th] at p. 658, italics added.) 'Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the [Board].'" (*In re Burdan*, *supra*, 169 Cal.App.4th at p. 28.)

In two companion cases, *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), the California Supreme Court clarified the standard for determining if "some evidence" supports a decision of the Board to deny parole. In particular, the high court considered whether the proper focus should be on whether there is "some evidence" to support the rationale articulated by the Board, or whether there is "some evidence" of the core determination that the inmate remains a current threat to public safety, and concluded it is the latter. (*Shaputis*, *supra*, 44 Cal.4th at p. 1254.) "Where one or more factors are used to support a denial

of parole, the relevant inquiry is whether those factors, when considered in light of the other factors in the record, are predictive of current dangerousness of the inmate. (*Shaputis*, *supra*, 44 Cal.4th at pp. 1254-1255.)" (*In re Burdan*, *supra*, 169 Cal.App.4th at p. 29.)

II

Motion to Dismiss

On July 21, 2009, while Saepharn's petition was pending in this court, the Board issued a miscellaneous decision finding the Board panel violated California Code of Regulations, title 15, section 2235(a), in relying on confidential information in reaching its April 30, 2008, decision, without making a finding on the record that such information is reliable. The Board disapproved the decision and scheduled a new parole suitability hearing.

Eight days later, the Warden moved to dismiss Saepharn's petition as moot. The Warden argues that, because this court's power is limited to setting aside the parole decision and sending the matter back to the Board for a new hearing, Saepharn has already received all the relief to which he would be entitled if he were to prevail on the merits of his petition.

Saepharn filed opposition, arguing the Board's April 30, 2008, decision became final 120 days after it was issued, which was long before the Board's purported disapproval of the decision and grant of a new hearing. Saepharn further argues allowing the Board to disapprove a decision and order a

rehearing after expiration of the 120-day period, a procedure that could be repeated indefinitely by the Board, would deprive him of the opportunity ever to obtain judicial review. According to Saepharn, we should review the matter now and order his release or, at the very least, direct the Board to conduct a new hearing limited to matters arising after the original decision, any confidential information omitted from the record, and any rebuttal offered by him to the statements made by the victim's family. Since this relief would be more beneficial to him than that ordered by the Board, he argues, the matter is not moot.

"'[T]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.'" (*Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863; accord, e.g., *Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1503 ["A case becomes moot when a court ruling can have no practical impact or cannot provide the parties with effective relief"].)

Saepharn's primary contention in this writ proceeding is that, contrary to the requirements of *Lawrence* and *Shaputis*, the Board panel failed to link any of the factors it used to deny parole to current dangerousness. According to Saepharn, the panel relied on three factors: (1) the seriousness of the commitment offense; (2) lack of remorse; and (3) statements by the victim's family at the hearing. Saepharn argues the latter two factors are unfounded, and there is nothing in the record to suggest any of the three factors supports a finding that he poses a current danger. Saepharn also raises a procedural issue, arguing the Board panel erroneously failed to afford him an opportunity to rebut the statements by the victim's family.

The Warden disagrees with Saepharn's contentions, but acknowledges another procedural error, that cited by the Board in its decision to set aside the parole denial. At the parole hearing, one panel member mentioned the panel had considered a confidential file in reaching its decision and had made a confidential recording of their actions. However, neither the confidential file nor the confidential recording is in the record before us. Saepharn does not dispute this procedural defect.

The basic premise of Saepharn's argument that this matter is not moot is that, if successful on the merits of his petition, he would be entitled to release or to a limited new hearing that would be more advantageous to him than the rehearing ordered by the Board. We disagree. Saepharn's primary argument is that the Board panel failed to link the

factors it considered to current dangerousness. Assuming this is true, it is not surprising. The panel's decision was reached before the state high court issued *Lawrence* and *Shaputis*.

However, there is ample evidence in the record from which the panel could have made such a finding. Even ignoring the seriousness of the commitment offense, the panel concluded Saepharn's remorse did not appear to be genuine and he appeared to be just going through the motions in taking responsibility for the crimes. In this regard, it is noteworthy that Saepharn's description of the offense at the hearing differed markedly from what he told police the day of the murders. He told police he knocked the victim down and stabbed her with a knife he had hidden in the bedroom. However, at the parole hearing, Saepharn said that after he hit the victim, she came at him screaming and he first choked her before stabbing her. He also claimed he had not hidden the knife in the bedroom but had brought it there a couple of days earlier for the purpose of cutting fruit. Saepharn told the panel he was upset because he had recently learned the victim's family had been using his name to smuggle opium into the Country. In effect, Saepharn described the offense in such a way as to put less blame on himself and more on the victim and her family. This hardly sounds like someone who has taken responsibility for his actions.

Furthermore, as Saepharn acknowledges, the record before us is incomplete. We do not have the confidential information considered by the Board panel. Without the complete record, we

cannot say whether *some evidence* would support a finding of current dangerousness. The most we could do at this juncture is to return the matter to the Board for a complete new hearing, which the Board has already ordered.

The same goes for Saepharn's alleged procedural defect. If we were to agree the Board panel erred in denying Saepharn an opportunity to rebut the statements of the victim's family, the appropriate remedy would be to order a new parole hearing at which Saepharn would be given an opportunity to present such rebuttal.

Thus, even assuming the Board had no power to disapprove its April 30, 2008, decision, Saepharn has nevertheless received all the relief to which he would be entitled if he were to prevail on the merits in this matter. The petition is therefore moot.

DISPOSITION

The petition for writ of habeas corpus is dismissed as moot.

HULL, Acting P. J.

We concur:

ROBIE, J.

CANTIL-SAKAUYE, J.